No. 91-178

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIRLINES, INC.,
An Illinois Corporation,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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I.

SUMMARY OF ARGUMENT

Respondent United Airlines, Inc. (United) in its opposing brief in No. 91-178, actually confirms the need to grant certiorari in this case by raising arguments which highlight the current inconsistencies and confusion in the policy of Railway Labor Act (RLA) preemption of state tort claims.

Respondent acknowledges that the Hawaiian Supreme Court's decision in *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *cert. denied, Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 1693 (1985) (App. 1) is in accord with "traditional RLA preemption analysis" (p.20, ftnt.25.) In that case the court held that a claim was not preempted by the RLA when "the source of the right" on which it was based was statutory, and when the claim was not identical to any claim that could have been made under the collective bargaining agreement (CBA). *Id.* (App. 7, 10.)

At the same time, however, Respondent argues that the RLA preempts any state claim which merely "refers" to terms contained in the CBA, contending that the word "interpretation" is defined very differently under the RLA than it is under the Labor Management Relations Act (LMRA). (p.15, ftnt.21.)

Another reason for granting certiorari, which United highlights in its opposing brief, is the threat to the federal labor scheme from the creation and enforcement of "separate contracts." (p.22.) Respondent argues that petitioner threatens the federal labor scheme by seeking damages for what amounts to a "separate agreement."

Respondent admits that United's representations[1] would constitute an agreement "separate" from the CBA. However, Respondent fails to acknowledge that it is not Petitioner's claim for damages which threatens the federal labor scheme. It is United's own conduct in initially offering, entering into and enforcing this separate agreement which constitutes the threat.

Finally, throughout its Brief in Opposition, Respondent supports its position by mischaracterizing Petitioner's claims, as in its contention that *Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir.), *cert. denied*, ___ U.S. ___, (111 S.Ct. 386) (1990), a wrongful termination action based squarely on the CBA, raises issues "identical" to those raised in this case. (pgs. 2, 6-7, 15.)

II.

RESPONDENT'S STATEMENT OF FACTS

The Statement of Facts in Respondent's Counterstatement of the case actually confirms Petitioner's allegations.

Respondent does not dispute Petitioner's allegations of misrepresentations regarding "waiver" of the weight program or the availability of medical exceptions. Nor does Respondent dispute that United communicated directly with the Pan American Airlines (Pan AM) flight attendants during the recruitment process, with none of the unions participating in that process. However, Respondent does state that as early as September, 1985,

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[1] Respondent's Counter Statement of the Case does not dispute Petitioner's allegations.

when United and the Association of Flight Attendants (AFA) first began negotiating over working conditions for Pan Am transferees (p.2), United told AFA that Pan Am transferees would be subject to the weight program. (p.3).

Respondent does not state that the terms of the agreement reached with AFA was communicated to the transferees. However, Respondent does state that agreement was not reached until "in the month prior to Petitioner's commencing employment at United" (p.3). Thus, not only was Petitioner not an employee at the time the misrepresentations were made, but the CBA which purportedly preempts her fraud claims did not even exist at that point.

III.

REASONS FOR GRANTING THE WRIT

A. RESPONDENT ACKNOWLEDGES THAT THE RLA DOES NOT PREEMPT STATE TORT CLAIMS STEMMING FROM A STATE STATUTE RATHER THAN FROM THE CBA

Respondent admits that the decision of the Hawaiian Supreme Court in *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *cert. denied, Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 1693 (1985) (App. 1) is in accord with traditional RLA preemption analysis.

However, contrary to Respondent's interpretation of *Puchert*, the decision does not say that the state claim avoids preemption because the dispute in question is "solely dependent on the statutory language." (p.20,

ftnt.25.) Rather than base its holding on such narrow grounds, the Hawaiian Supreme Court concluded that " . . . the *source of the right* on which Puchert based his complaint is state statute, not the collective bargaining agreement." (Emphasis added.) (App. 10) The court also concluded that the statute itself is not preempted by the RLA because the state has a substantial interest and because the regulation did not interfere with the scheme and purpose of the RLA. (App. 10.)

Citing decisions under both the RLA and the LMRA the Hawaiian Supreme Court noted that courts are not denied jurisdiction over statutory claims " . . . merely because a collective bargaining agreement exists which provides for grievance and arbitration procedures." *Id.* (App. 7.)

The court distinguished cases which have found preemption, on the grounds that the claims in those cases were identical to contractual claims under the CBA. *Id.* (App. 7.) That is also the distinguishing feature of the cases cited by Respondents, including *Andrews v. Louisville & Louisville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562 (1972). Respondent refers to *Andrews*, a wrongful termination case, as a decision by this Court which expressly holds a state tort claim preempted by the RLA. (p.19, ftnt.24.) Technically, Respondent is correct, but the Court's reason for preempting the wrongful termination claim was that the CBA was the exclusive source of Petitioner's right not to be terminated, making it essentially a dispute over contract interpretation. *Id.* at 324, 1565.

1. THE NINTH CIRCUIT HAS ALSO HELD THAT THE RLA DOES NOT PREEMPT STATE CLAIMS STEMMING FROM A STATUTE RATHER THAN FROM THE CBA

On August 26, 1991, a different panel of the Ninth Circuit Court of Appeals handed down *Polich v. Burlington Northern, Inc; Burlington Northern Railroad Company,* 91 C.D.O.S. 6816 (9th Cir. 1991) (App. 12). In *Polich* the appellants brought claims under a Montana statute which awarded damages for devaluation of an employee's property if devaluation was caused by the closing of a railroad "division point or terminal. . . . " Mont. Code Ann. 69-14-1002, 1989. Appellees argued that the statutory terms "division point" and "terminal" required reference to the CBA. The court of appeals disagreed on the ground that the coverage of the statute would depend on the statute's definition of those terms.[2] The court said, "The fact that a CBA provides some particular protections is not relevant to a claim based on a totally different type of protection afforded under a statute." *Id.* (App. 20)

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[2] In fact, neither Mont. Code Ann. 69-14-1002, nor the statutory scheme in which it is contained expressly defines "division point" or "terminal." Montana Code Annotated, 1989.

2. THE SUPREME COURT SHOULD CLARIFY THE USE OF THE TERM "INTERPRETATION" AS USED IN THE RLA AND AS USED IN THE LMRA

In spite of Respondent's acknowledgement of *Puchert*, and in apparent contradiction to that decision, Respondent argues that mere "reference" to the CBA is sufficient for preemption under the RLA, regardless of the source of the right in question and regardless of whether the claim could be the subject of a grievance under the CBA.

Respondent argues that "interpretation" of the CBA has a different meaning under the RLA than it does under the LMRA. Respondent states that "interpretation" as used in the LMRA is "tantamount to requiring an analysis or study of contractual terms to ascertain their meaning or effect." (p.15, ftnt.21), but contends that as used in the RLA it means mere "reference." (p.15, ftnt.21.)

In this case, in analyzing United's "deceit" pursuant to Cal. Civ. Code Sections 1709 and 1710 (Pet. App.30) the trier of fact will look at United's suggestion, assertion or suppression of a fact which United knew, believed or should have known not to be true. Or the court will look for a promise made without any intention of performing it. Similar claims have recently been found not to require "interpretation" of the CBA and not preempted by the LMRA. *See, Berda v. CBS Inc.* 881 F.2d 20 (3rd Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 879 (1990) (plaintiff need only establish that CBS' agents promised he

would not be laid off for a reasonable period of time although they knew or were reckless in not knowing that CBS was planning a reduction in force that would affect him), *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1959 (1990), (examination of the terms of a severance agreement in order to determine what the *truthful* representations should have been, established relevance of the agreement but not necessarily substantial dependence for preemption purposes), *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 481 U.S. 1049, 107 S.Ct. 3242, (Proof that Ford fraudulently induced employment by misrepresenting that new hires would not be "bumped" by "preferential hirees" does not depend on the existence of any contractual relationship nor do the standards for judging fraudulent misconduct derive from any contractually established expectations of the parties).

Application of such vastly different definition to the word "interpretation" when analyzing the preemptive effect of two federal statutes often used analogously, requires clarification by this Court.

B. IT IS UNITED'S CONDUCT WHICH THREATENS THE FEDERAL LABOR SCHEME, NOT PETITIONER'S CLAIM FOR DAMAGES

Petitioner has argued that her claims should not be preempted by the RLA because she was not an employee under the Act nor was she a party to the CBA at the time the misrepresentations were made. Respondent opposes with the statement,

> . . . Petitioner cannot deny that if United indeed made misrepresentations, those misrepresentations would form the terms of a separate agreement different from those of the collective bargaining agreement. Under these circumstances, the threat to the federal labor scheme is clear and cannot be permitted, regardless of Petitioner's employment status at the time of the alleged misrepresentations. (p. 22-23).

Again, Respondent has confirmed the very argument in support of certiorari. It is United Airlines, the employer, who violated the federal labor scheme by offering a "separate agreement," and using that agreement to induce Petitioner and others away from their employment with Pan Am.[3] United enforced that separate agreement by hiring Petitioner Melanson and others, in spite of the fact that they did not meet the weight requirements, and allowing them to fly for several months. United then unilaterally rescinded that separate agreement, when it served United's purposes to do so.

The federal labor scheme was violated before Petitioner brought this action. To allow United to benefit

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[3] It should be noted that Petitioner had no reason to be aware of the fact that this was an improper "separate agreement." A new agreement was being negotiated and the terms of that new agreement were not communicated to Pan Am transferees. The record at this point does not indicate whether the Association of Flight Attendants, (AFA) which represents United flight attendants, was aware of these misrepresentations, but it has been established that AFA was not in communication with the Pan Am flight attendants being recruited by United. Unrepresented prospective employees should not be held to a higher standard of knowledge of the intricacies of federal labor law than is the prospective employer.

from that violation by blocking any liability for its conduct is to permit United and other carriers to make a mockery of that federal labor scheme. Petitioner Melanson's claims are no threat to the federal labor scheme because she does not seek to enforce that "separate agreement." She is prepared to abide by the CBA. However, she seeks damages for her reliance on *United's* violations of that labor scheme.

C. RESPONDENT'S ARGUMENT AGAINST CERTIORARI IS BASED ON MISCHARACTERIZATION OF PETITIONER'S CLAIMS

The thrust of United's argument in opposition to certiorari is based on giving petitioner's claims and existing case law the very broadest possible reading, without acknowledging some very critical distinctions. Again, however, respondent's argument corroborates the importance of granting certiorari in this case, so that this Court may address some of those distinctions.

1. THIS CASE CANNOT BE COMPARED TO *GROTE V. TRANS WORLD AIRLINES, INC.*

United inaptly compares this case to *Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 386 (1990). Contrary to respondent's contention, these two cases do not raise identical issues. Grote brought an action in the United States District Court for the southern District of California. He alleged breach of duty of good faith and fair dealing as well as intentional and negligent infliction of

emotional distress and defamation, all of which were in response to an alleged wrongful termination. *Id.* 1309.

In California, breach of the duty of good faith and fair dealing is a tort claim based on breach of the terms of a contract. *Foley v. Interactive Data Corp.*, 47 C3d 654, 254 CR 211 (1988). Thus, Grote's claims would require reference to "interpretation" of the terms of the CBA and could not be "independent" of the CBA. As this Court decided in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. at 324, 92 S.Ct. at 1565 (1972) when the only source of the right not to be terminated is the CBA, it is essentially a question of contract interpretation.

The contrast to this case is obvious. Petitioner Melanson's claims are not based on any breach of the terms of the CBA. The Ninth Circuit held that her grievance, which did allege misapplication of the CBA, was a different issue. Melanson's claims would require no more than a "tangential" reference to the CBA. *See, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, at 211, 105 S.Ct. 1904, at 1911 (1985).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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George K. PUCHERT, Appellant,

v.

Joshua C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; Pan American World Airways, Appellees,

No. 8908.

Supreme Court of Hawaii.

Jan. 27, 1984.

* * *

WAKATSUKI, Justice.

This is an appeal of the first circuit court's affirmance of the director of labor and industrial relations' dismissal of Appellant's complaint of unlawful discharge from employment pursuant to Hawaii Revised Statutes (HRS) § 378-32(2). The complaint was dismissed for untimely filing under HRS § 378-33(b).

The primary issue involves the construction of a statute, HRS § 378-33. As construed by the director and the lower court, HRS § 378-33(b) requires the filing of a complaint of unlawful discharge from employment only after an employee is able to return to his former job, and not any sooner. We hold that such a construction of the statute does not comport with the legislative purpose and intent of HRS §§ 378-32 and 378-33, and therefore, we reverse.

The parties involved in this action are (1) Appellant Puchert, the employee who filed the complaint of unlawful discharge; (2) Appellee Pan American World Airways (Pan Am), the employer against whom the complaint was

filed; and (3) Appellee Agsalud, Director of the State Department of Labor and Industrial Relations (Director) who dismissed Puchert's complaint.

At the time of his alleged unlawful discharge, Puchert had been employed for several years as a port steward by Pan Am. On several occasions, Puchert had suffered back injuries at work, the last of which occurred on December 30, 1978. Due to this December 30th injury, Puchert did not return to work until January 6, 1979, at which time he was allowed to do only light duty work upon the instructions of his chiropractor. By letter of January 9, 1979, Puchert was discharged by Pan Am. The basis for this discharge was Puchert's physical limitations in performing his work.

On January 14, 1979, Puchert, through his union (Transport Workers Union of America), filed a grievance with Pan Am as to his discharge pursuant to a collective bargaining agreement between Pan Am and the Transport Workers Union. The grievance was brought before the Board of adjustment for arbitration on February 7, 1979. The Board's decision modified Puchert's dismissal to a medical leave of absence not to exceed six months, and further, required that Puchert, during that six-month period, obtain a medical report from a physician approved by Travelers Insurance Company and a permanent disability rating from the State Department of Labor and Industrial Relations (department) Workers Compensation Division which would not restrict him from performing any of the duties of a port steward. The decision further stated that, upon his return to work, Puchert would be required to comply with Pan Am's attendance standards.

On June 1, 1979 Puchert filed a complaint, pursuant to HRS § 378-32, for unlawful discharge against Pan Am with the department's Enforcement Division. Prior to filing his complaint, Puchert was advised by department personnel to wait until he was released by his doctor to return to work but this advice was not heeded and the complaint was filed.

Five days prior to the expiration of Puchert's medical leave of absence, as granted by the Board of Adjustment, Pan Am asked Puchert to advise the company of his intention to return to work.

On August 1, 1979, Puchert's chiropractor submitted a letter to the department stating that Puchert was still only available for light duty work. However, on August 6, 1979, Puchert was able to obtain a letter from the same chiropractor releasing him for regular duty "on a trial basis."

The facts are not clear whether Puchert reported for duty on August 7, 1979, and was then discharged, or whether he received notification of his termination in some other manner. Nonetheless, Pan Am contends that on August 7, 1979, Puchert had not complied with the terms of the Board of Adjustment's decision, and therefore he had no right to return to work.

Neither on August 7, 1979, nor at any time thereafter did Puchert file another complaint with the department for unlawful discharge.

In June, 1980, a year after Puchert filed his complaint for unlawful discharge with the department, and ten months from the date he was allegedly able to return to

work as a port steward, the department held hearings on Puchert's complaint of June 1, 1979. Thereafter, the hearing officer recommended that the complaint be dismissed for lack of jurisdiction due to the untimely filing of the complaint. The hearing officer concluded that under HRS § 378-33, the only time Puchert could file a complaint for unlawful discharge was within thirty days after his January 9, 1979 discharge, or within thirty days from the date he was able to return to work. Director Agsalud concurred with the hearing officer's recommended decision. Puchert appealed, and the circuit court affirmed the director's decision.

I.

Before proceeding to an analysis of HRS § 378-33, we address Pan Am's assertion that federal pre-emption applies in view of the federal labor law which provides that where a collective bargaining agreement provides for a resolution of a dispute of this nature through grievance and arbitration proceedings, this court lacks jurisdiction. Although federal preemption was not the basis upon which the director and the circuit court dismissed Puchert's complaint, the question of a court's jurisdiction cannot be disregarded. *State v. Johnston*, 63 Haw. 9, 11, 619 P.2d 1076, 1077 (1980).

The doctrine of labor law pre-emption concerns the extent to which congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor management relations. *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 527, 99 S.Ct. 1328, 1334, 59 L.Ed.2d 553 (1979).

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, which applies in this case, provides for compulsory arbitration to settle "minor disputes". *Andrews v. Louisville and Nashville R.R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), *International Assn. of Machinists, AFL-CIO v. Central Airlines*, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963), *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir.1983). A "minor dispute" exists where a collective bargaining agreement provides a remedy for an alleged wrongful act. *Andrews, supra; Schroeder, supra; REA Express, Inc. v. Brotherhood of Ry. Airline and Steamship Clerks, etc.*, 459 F.2d 226 (5th Cir.1972).

Cases holding that state law claims are pre-empted by the RLA are clearly distinguishable. The complaints filed in those cases constituted state law claims that were non-existent but for the collective bargaining agreement which provided remedies for such claims, or the state law claims were identical to the contractual claims provided for in the collective bargaining agreement. *E.g., Andrews v. Louisville and Nashville RR Co., supra,* (state law claim of unlawful discharge depended solely on contract right not to be discharged); *Schroeder v. Trans World Airlines, Inc., supra* (complaint of unlawful business practices in violation of California statutes was actually a complaint of wrongful demotion under the collective bargaining contract); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir.1983) (complaints alleging intentional infliction of emotional distress referred to rights covered or substantially related to the collective bargaining agreement); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.1978) (emotional distress incident of discharge from employment rather than result of alleged

conspiracy); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) (state claim raised identical to claim employee would have made had he pursued his grievance through channels specified in the collective bargaining agreement).

Puchert's complaint, however, does not constitute a "minor dispute" subject to mandatory arbitration under the RLA. The resolution of the dispute in question does not hinge on the application or interpretation of the collective bargaining agreement between Pan Am and Puchert's union. Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute. *See Air Line Pilots Assn. v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C.Cir.1980).

If Puchert were not permitted to pursue his claim of wrongful discharge under HRS § 378-32 before the state agency and courts, he would have no forum in which to press his claim. An arbitrator may only arbitrate disputes arising under the provisions of the collective bargaining agreement, 51A *C.J.S.* Labor Relations § 429 (1967), and is limited to the interpretation and application of provisions contained within the agreement. *United Steelworkers of America v. Enterprise Wheel*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The arbitrator – in this case the Board of Adjustment – would have no authority to consider Puchert's statutory claim. *See Air Line Pilots Assn. v. Northwest Airlines, supra; Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

Other employment relations cases brought under federal statutes have held that where the right upon which the complaint is based is statutory, courts are not denied jurisdiction merely because a collective bargaining agreement exists which provides for grievance and arbitration procedures. *Alexander v. Gardner-Denver Co., supra; Harris v. Norfolk and Western Railway Co.*, 616 F.2d 377 (8th Cir. 1980) (race discrimination suits brought under Title VII of the Civil Rights Act of 1964); *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (wage dispute under Fair Labor Standards Act); *Airline Pilots Assn. v. Northwest Airlines, supra* (violation of ERISA fiduciary standards in managing collectively bargained pension plan); *Johnson v. American Airlines, Inc.*, 487 F.Supp. 1343 (N.D.Tex.1980) (suit brought under the Age Discrimination in Employment Act).

State court jurisdiction has similarly been upheld where it was clear that the source of the right alleged to have been violated was state statute rather than the collective bargaining agreement. *Bald v. RCA Alascom*, 569 P.2d 1328 (Alaska 1977) (religious discrimination in violation of state antidiscrimination statute); *Franklin Manufacturing Co. v. Iowa Civil Rights Commission*, 270 N.W.2d 829 (Iowa 1978) (employer's group insurance plan violative of state sex discrimination laws); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), and *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 611 P.2d 281 (1980) (violation of state statute prohibiting discharge for filing workers compensation claims).

Inasmuch as Puchert's claim of unlawful discharge has its source in state statute and his claim is not identical to any claim he may make under the collective bargaining

agreement, we hold that Puchert is not limited to pursuing remedies in the grievance and arbitration procedures established under the collective bargaining agreement.

Although we find that Puchert's state law claim does not interfere with the provisions of the collective bargaining agreement, we must also consider whether application of state law in this case interferes with the scheme of the RLA.

This Court recently reviewed the question of preemption in the area of labor law in *Gouveia v. Napili Kai, Ltd.*, 65 Haw. 189, 649 P.2d 1119 (1982). There we concluded that the National Labor Relations Act (NLRA) bestowed exclusive jurisdiction to the National Labor Relations Board on certain matters, *Id.* at 193-194, 649 P.2d 1119, quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Yet congress did not wholly pre-empt state regulation. *Id.* 65 Haw. at 194, 649 P.2d 1119, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953). States retained the "power to regulate where the activity regulated was merely a peripheral concern of the [NLRA]." and "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that in the absence of compeling congressional direction, . . . [it] could not infer that congress had deprived the states of power to act." *Id.*, 65 Haw. at 195, 649 P.2d 1119, quoting *San Diego Bldg. Trades Council v. Garmon, supra.*

Gourcia and the cases cited therein examined the conflict between state law and the NLRA. This case, on the other hand, involves federal-state relations under the

RLA but the problems and considerations are analogous, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), and courts have applied standards adopted in NLRA pre-emption cases to RLA cases. *E.g., Beers v. Southern Pacific Transportation Company, supra; Magnuson v. Burlington Northern, Inc., supra; Majors v. U.S. Air Inc.*, 525 F.Supp. 853 (D.Md.1981); *Jackson v. Consolidated Rail Corp., supra.*

The precise issue of whether state statutes prohibiting unlawful discharges for injuries compensable under workers' compensation laws withstands federal pre-emption was presented in *Peabody Galion v. Dollar, supra,* and *Vaughn v. Pacific Northwest Bell Co., supra.*

The Oklahoma statute examined in *Peabody Galion* and the Oregon statute in *Vaughn* are substantially similar to HRS § 378-32. Both the Tenth Circuit Court of Appeals[1] and the Oregon Supreme Court, respectively, concluded that the state statutes are not pre-empted by federal labor laws. Both courts found that the subject of the respective statutes was of peripheral concern to the federal laws because it had nothing to do with collective bargaining or union organization. *Peabody Galion,* 666 F.2d at 1316; *Vaughn,* 289 Or. at 82, 611 P.2d at 287. Additionally, workers' compensation "is pre-eminently a matter of state concern," *Peabody Galion,* 666 F.2d at 1316, and the "state has a substantial interest in protecting the integrity of its workers' compensation system." *Vaughn,* 289 Or. at 82, 611 P.2d at 287.

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[1] *Peabody Galion* came before the Tenth Circuit Court of Appeals as a diversity action.

We agree with the analysis of both the Tenth Circuit and the Oregon Supreme Court in these cases. While both cases were decided in the context of the NLRA, we find the same standard applicable here and the consideration analogous. We, therefore, hold that HRS § 378-32, is not pre-empted by the RLA in this case and that the department of labor and the state courts have jurisdiction to hear Puchert's complaint. The source of the right on which Puchert bases his complaint is state statute, not the collective bargaining agreement. His claim of discrimination in violation of the statute could not be considered by the Adjustment Board whose authority extends only to interpretation or application of the collective bargaining agreement. Thus, Puchert's only means of having his cause of action heard is through the administrative and judicial procedures prescribed by state statute. Furthermore, the state statute on which Puchert relies in advancing his unlawful discharge claim is not pre-empted by the RLA. The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute. Such regulation by the state does not interfere with the scheme and purposes of the RLA.

* * *

(Section II, analysis of HRS Sections 378-33(b) has been omitted.)

CONCLUSION

We hold that the circuit court erred in affirming the director's decision dismissing Puchert's complaint for

untimely filing. Further, we hold that Puchert's statutory claim is not pre-empted by the collective bargaining agreement or federal labor laws, nor is his claim barred by the doctrine of laches. We, therefore, reverse and remand Puchert's complaint to the department for a hearing on the merits.

Cite as 91 C.D.O.S. 6816

VICTOR J. POLICH, et al., Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN, INC.; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, Defendants-Appellees.

GOODWIN, Circuit Judge:

Following a series of mergers and reorganizations, the Burlington Northern Railroad Company closed its railroad operations in Livingston, Montana. Appellants, who include both former Livingston employees and spouses of former employees, sued the Burlington Northern Railroad Company and Burlington Northern, Inc. (collectively, BN) for damages arising out of the closure. They appeal the dismissal of the action for want of subject matter jurisdiction. We affirm in part and reverse in part.

The complaint alleged that BN breached its promise to employees and their spouses to keep its Livingston railroad facilities open and operational, and committed actual and constructive fraud in closing the facilities. The complaint alleged that BN made these promises during the course of two different corporate reorganizations.

The first incident allegedly occurred in 1970, when Burlington Northern, Inc. (the predecessor to the current BNRC) was created as a result of an Interstate Commerce Commission-approved merger among several railroads. The complaint alleged that at the time of this merger,

railroad officials made public assurances that railroad facilities in Livingston would never close.

The second set of promises was allegedly made in 1980 and 1981. In 1980, BNI merged with the St. Louis-San Francisco Railway Company. In 1981, BNI changed its name to Burlington Northern Railroad Company (BNRC) and took control of all railroad operations and assets. BNI was reformed as a holding company, which now includes other businesses in addition to railroads. The complaint alleged that BNRC and BNI officials made public assurances that railroad operations in Livingston would not be adversely affected by either the St. Louis-San Francisco merger or the 1981 reorganization. The complaint further alleged that BN intended that the plaintiffs would rely on these promises and that the plaintiffs did so rely.

Defendants moved to dismiss, or for summary judgment, on the ground that plaintiffs' claims were preempted by the Interstate commerce Act and the Railway Labor Act. Plaintiffs thereafter moved to file a third amended complaint, which included allegations that BN violated section 69-14-1002 of the Montana Code. This statute purports to require railroads to compensate workers when the value of their homes is destroyed by the closure of a railroad terminal or division point. The district court denied the motion and dismissed the action.

I. *Railway Labor Act Preemption*

Appellants contend that their state law claims were not preempted by the Railway Labor Act (RLA), 46 U.S.C. §§ 151-163 (1988). They argue that their state law claims neither involve nor implicate any collective bargaining

agreement, and hence do not constitute a "minor dispute" which would be preempted by the RLA.

This court reviews *de novo* the district court's dismissal for lack of subject matter jurisdiction. *FDIC v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989). We may affirm on any ground finding support in the record. See *Smith v. Block*, 784 F.2d 993, 996 n.4 (9th Cir. 1986). We may affirm even if the district court relied on the wrong grounds or the wrong reasoning. See *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985); *Alcaraz v. Block*, 746 F.2d 593, 602 (9th Cir. 1984).

A. *Employee Claims*

Under the RLA, 45 U.S.C. §§ 152-153, employer-employee disputes classified as "minor disputes" are "subject to compulsory . . . arbitration before the National Railroad Adjustment Board . . . or before an adjustment board established by the employer and the unions representing the employees." *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n*, 491 U.S. 299, 303-04 (1989). The district court lacks subject matter jurisdiction over "minor disputes." *Daniels v. Burlington Northern Railroad Co.*, 916 F.2d 568, 570 (9th Cir. 1990).

The district court held that a claim was a "minor dispute" subject to the exclusive jurisdiction of the RLA if it was "founded on some incident of the employment relationship," whether or not the claim was covered by a collective bargaining agreement. Appellants argue that the district court applied the wrong standard, and that preemption is proper only if the dispute involves the

application or interpretation of an existing collective bargaining agreement. This argument does not assist appellants' cause. Even if preemption occurs only when resolution of the dispute involves the interpretation of a collective bargaining agreement, we have concluded that the employee-appellants' claims are preempted.

Appellants argued that their claims were not preempted because appellants would seek to prove that the promises at issue were outside the scope of the collective bargaining agreement (CBA). However, in determining whether a dispute is preempted, the plaintiff's pleadings and offers of proof are not controlling. The claim is also preempted if the railroad seeks to defend its conduct on the ground that the conduct was justified by the terms of the CBA. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 29, 305-07 (1989).

We will not find preemption if the railroad's assertion regarding the CBA is "frivolous or obviously insubstantial." *Id.* at 307. But the railroad's burden in establishing preemption is "relatively light," and we will find preemption if the employer's conduct is "arguably justified" by the terms of the CBA. See *id.* BN stated that it intended to defend its actions on the ground that those actions were permitted by the CBA, and that based on that proposed defense, appellants' claims were preempted.

The district court had before it the affidavit of Maxine Timberman, BNRC Assistant Director of Labor Relations. Timberman's affidavit, which was never

contradicted, states that all employee-plaintiffs were covered by labor protective or collective bargaining agreements.[1] Each union had a separate agreement. Timberman attached one sample agreement, from 1964, which she swore contained provisions typical of each union's agreement. Timberman further swore that the closure of the Livingston facilities was conducted in accordance with those agreements.

Ms. Timberman attached copies of the letters notifying employee unions that work would be transferred from Livingston. She stated that "[t]he notices were issued in compliance with the Schedule Agreement and constituted the maximum notice required under the various protective arrangements for each of the involved crafts." She further swore that all unions with affected members negotiated with BN about matters such as "seniority, job protection, moving expenses and all matters relating to employment termination or transfer."

The witness further swore that all of the collective bargaining agreements and protective agreements contained arbitration provisions. Appellants have never denied the existence of the coverage of the collective bargaining agreements, and the court had the right to accept the undisputed affidavit establishing that all employee-plaintiffs were covered by collective bargaining agreements.

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[1] Timberman was able to identify the dates of service and the union membership of almost all employee-plaintiffs. She was unable to locate the records of four employee-plaintiffs, but asserted her belief that those four were also union members covered by collective bargaining agreements.

Based on our examination of the 1964 agreement, we hold that BN's conduct was "arguably justified" by the CBA. The 1964 agreement specified what protections would be afforded to employees in the event that facilities were abandoned. We do not need to decide whether the agreement did in fact justify BN's conduct. We hold only that appellees have made a non-frivolous argument that their conduct was so justified; under *Consolidated Rail*, this is sufficient to cause the employee-appellants' claims to be preempted by the RLA.

Appellants argue that at the time the promises were made, no collective bargaining agreements could have existed between the appellee corporations and the employee-appellants, because the appellee corporations did not exist. However, appellants also insist that under Montana law, the defendant corporations are liable for the promises of their predecessor corporations. Montana law provides that following a merger, the surviving corporation "possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations." Mont. Code Ann. § 35-1-806(2)(d) (1989). In addition, the surviving corporation "shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated." *Id.* § 35-1-806(2)(e). Thus, BNRC and BNI are responsible for promises made by their predecessors. In addition, they assume the rights stemming from any collective bargaining agreements made with their predecessors.

B. *Spouse Claims*

"Minor disputes" preempted by the RLA include " '[a]ll disputes between a carrier or carriers and its or their *employees*. . . . ' " *Daniels*, 916 F.2d at 570 (quoting 45 U.S.C. § 152 Second) (emphasis in original). Appellants contend that because RLA preemption applies only to employees, it does not apply to those appellants who are spouses of employees and are not employees themselves. Appellees argue that the spouses' claims are entirely derivative of the employees' claims, and so the spouses claims are also preempted.

The spouses would have an independent action against BN if they could show, *inter alia*, that BN knowingly made a false representation to them, that BN intended that they rely on the false representation, that they had a right to rely on it, that they did so rely, and that they suffered damage as a result of that reliance. See *Wiberg v. 17 Bar, Inc.*, 241 Mont. 490, 788 P.2d 292, 295 (Mont. 1990) (outlining the requirements for proving fraud under Montana law). By contrast, the spouse-appellants' claims are derivative if it was only the employees who relied on the promises, and if the spouses' claims are for damages they sustained when the employees lost their jobs.

The complaint alleged various types of damages, including "family separations and loss of jobs, homes, property, opportunity, security and emotional stability, in addition to losing their opportunity to object to the mergers and/or foundation of the holding company." The complaint fails to show any way in which the spouses were damaged as a result of their own independent

reliance on BN's alleged promises, with the possible exception of losing the opportunity to object to the mergers. Rather, the claims of the spouses are based on damages they suffered because the employees lost their jobs. Therefore, those claims are derivative of the employees' claims, and the district court's jurisdiction over those claims was preempted by the RLA to the same extent it was preempted for the employees' claims. To the extent that the spouse appellants seek to show independent reliance based on giving up their opportunities to object to the mergers, that claim is preempted by the jurisdiction of the Interstate Commerce Commission, as discussed below.

We find no other allegations in the complaint of independent reliance by the spouses. Therefore, we dismiss the action of the spouse appellants for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6).

C. *Statutory Claim*

The district court refused to allow appellants to file a third amended complaint, which appellants sought to add a claim based on section 69-14-1002 of the Montana Code. This statute provides that if a railroad company operating in Montana moves a division point or terminal, it shall be liable "to any employee of such railroad or railway company for any damage sustained by such employee by reason of any decrease in value of any real property actually occupied by such employee as his place of residence, which decreased in value shall be caused by

reason of the removal of such division point or terminal. . . . " Mont. Code Ann. 69-14-1002 (1989). Appellants filed their original complaint based on the railroad's closure of shops located in Livingston. After appellants had filed this complaint, the railroad allegedly took the further step of closing the Livingston terminal. At that point, appellants sought to amend their complaint to state a claim under the Montana statute.

Appellees argue that this claim is preempted, because "[n]o sense can be made of the statutory terms 'division point' or 'terminal' without reference to the collective bargaining agreement." However, the collective bargaining agreement is not relevant to this claim. The claim is based on the terms of the statute. The coverage of the statute would depend on the statute's definition of a "terminal," not the CBA's. Appellees have not made any other argument about why the statutory claim should be preempted, nor have we found any basis for preemption based on our review of the 1964 collective bargaining agreement.

The agreement states that the purpose of the section on employee protection is "to afford protective benefits for employees who are displaced or deprived of employment as a result of changes in the operations of the carrier. . . . " The agreement nowhere states that the protections stated in the CBA are exclusive of any protections that might be provided under state law or that employees have agreed to give up any protections to which they are entitled under state law. Indeed, statutes often provide protections for employees beyond those provided in CBAs. See, *e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that petitioner's remedy

under Title VII of the Civil Rights Act was in addition to remedies available under the collective bargaining agreement in force between his employer and his union). The fact that a CBA provides some particular protections is not relevant to a claim based on a totally different type of protection afforded under a statute.

Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985). Appellants have sated a cause of action pursuant to the Montana statute, and the amendment should have been permitted. If the statute is invalid as a burden on commerce, or is subject to some other defense, those questions can be resolved in the trial court.

D. *Status of Holding Company*

Finally, appellants contend that because of BNI's status as a holding company, BNI is not a railroad carrier subject to the provisions of the Railway Labor Act, including RLA preemption. If BNI is merely a holding company, then appellants have failed to explain how BNI caused the closure of the Livingston facilities and have sued the wrong defendant.

II. *Interstate Commerce Act Preemption*

BN argues, in the alternative, that appellant's claims are preempted under the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917 (1988). Because the district court found all claims to be preempted by the RLA, it did not

reach this issue, and appellants declines to address the issue of ICA preemption in their briefs.

Because we hold that one of appellants' claims is not preempted by the RLA, and because we may affirm on any ground finding support in the record, see *Smith v. Block*, 784 F.2d at 996 n.4, we turn to the issue of ICA preemption.

A railroad carrier may not merge with another carrier without the approval and authorization of the ICC. 49 U.S.C. § 11343(a)(1) (1988); *Kraus v. Santa Fe Southern Pacific Co.*, 878 F.2d 1193, 1197 (9th Cir. 1989), cert. dismissed, 110 S. Ct. 1329 (1990). The Interstate Commerce Commission has exclusive jurisdiction over such mergers. 49 U.S.C. § 11341(a) (1988). It is undisputed that the ICC approved both mergers at issue here.

In their second amended complaint, appellants alleged that BN officials made public assurances that the Livingston railroad facilities would never close if the 1970 and the BNRC-St. Louis/San Francisco Railway Company mergers were approved. Appellants further alleged that the 1970 merger was approved as a direct result of these promises. Finally, appellants alleged that BN was under a continuing duty to disclose to appellants the effect of the proposed mergers on railroad facilities in Livingston.

The complaint alleged that the plaintiffs, including the spouse plaintiffs, lost their opportunity to object to the mergers because of their reliance on the railroad's promises. To the extent that appellants' claims stem from alleged fraud in connection with the ICC's approval of the mergers, the ICC has exclusive jurisdiction. *Kraus*, 878 F.2d 1198 (district court lacked jurisdiction over plaintiff

railroad employees' claims arising out of allegedly unauthorized merger because ICC has exclusive jurisdiction over enforcement of the merger provisions of the ICA). Thus, the spouse appellants cannot establish jurisdiction based on a claim that they independently relied on BN's promises by giving up their opportunities to object to the mergers.

On the other hand, to the extent that violation of ICA merger provisions is not an essential element of appellants' state law claims, these claims are not barred. *Id.* at 1199-1200. Appellants' claim under the Montana statute has no connection with violation of any provisions of a merger. The statute provides that employees should be compensated for the loss in value of their homes any time a railroad closes a terminal in the state, regardless of the reason for the closure. Appellants do not need to show any wrongdoing on the part of the railroad to recover under this statute, and arguments regarding approval of the merger have no relevance to this claim. Thus, this claim is not preempted by jurisdiction of the ICC.

CONCLUSION

Appellants' should be permitted to amend their complaint to state a cause of action under section 69-14-1002 of the Montana Code. We affirm the judgment dismissing appellants' other claims. Each party will pay its own costs on this appeal.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.